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IN THE

Supreme Court of the United States

[illegible] Term, 1971

No. 1327

[illegible] PETITIONER

vs.

PENNSALT CHEMICALS CORPORATION RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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IN THE

Supreme Court of the United States

_____ Term, 1971

No. _____

JESSE R. GIBS PETITIONER

vs.

PENNSALT CHEMICALS CORPORATION RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, Jesse R. Gibs, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above entitled case on September 30, 1970.

OPINIONS BELOW

The opinion and order of the District Court is unreported and is printed in Appendix A hereto.

The opinion of the Sixth Circuit Court of Appeals is reported at 433 F2d 1020 and is printed in Appendix B hereto. The order denying the petition for a re-hearing with the suggestion for a re-hearing en banc is unreported and is printed in Appendix C hereto.

JURISDICTION

The United States District Court for the Western District of Kentucky entered judgment on a directed verdict for the respondent in this diversity action (Appendix A). Petitioner's appeal to the Sixth Circuit Court of Appeals was denied on September 30, 1970 (Appendix B). Petitioner's due and timely petition for re-hearing was denied on November 10, 1970 (Appendix C). The jurisdiction of this Court is invoked under 28 USC., § 1254 (1).

QUESTIONS PRESENTED

Whether this court will protect the right of trial by jury of a human being condemned to a life of cruel and inhuman punishment even though in a civil action.

Otherwise put:

a. Can a Federal Court in a diversity action deny a party trial by jury by directing a verdict for the adverse party when there exists questions of fact, material to the issue, under the applicable state law?

b. Can a Federal Court in a diversity action deny a party trial by jury by directing a verdict for the adverse party when under the federal test the sufficiency of evidence is such as to create a jury question?

CONSTITUTIONAL PROVISIONS

The constitutional provisions involved are Amendment VII to the Constitution of the United States of America and §. 7 to the Bill of Rights, The Constitution of Kentucky (1891). The foregoing are printed in Appendix D.

STATEMENT

I. The Facts.

Petitioner Jesse Olds has been condemned to a life of cruel and inhuman punishment by reason of the negligence

of the defendant in failing to see that a cover was placed over or a barricade placed around a pit in the floor where he was working. Since the pit was filled with standing water from steam not vented as safe practice required, petitioner was scalded from his waist down. As stated by the neurosurgeon, his "switchboard" in his brain is jammed open and he suffers exquisite pain all the time.

3. The Situation Leading to the Denial of the Petitioner's Right to Trial by Jury.

The courts below, entranced by arbitrary labels such as "independent contractor," refused to submit the question as to whether petitioner's employer ("Pip" Johnson Construction Company) was an independent contractor to the jury and ignored the vast control retained by the defendant over the corporation even to the control of safety standards and the absolute right without penalty to discharge the "Pip" Johnson Construction Company at any time simply by handing "Pip" Johnson a note to this effect.

4. Proceedings Below.

This action was instituted in the United States District Court for the Western District of Kentucky, at Paducah, Kentucky on January 31, 1968. Jurisdiction is in the District Court because of diversity of citizenship of the parties, 28 U.S.C., § 1332 (a). Trial was before a jury on May 22, 1969 and May 23, 1969. The trial court directed a verdict on the grounds that "Pip" Johnson was an independent contractor who insulated the defendant. The judgment was affirmed by the Court of Appeals for the Sixth Circuit on September 30, 1970. A petition for re-hearing was denied by that court by its order of November 10, 1970. The court's judgment was issued on November 19, 1970.

4. Reasons For Granting The Writ.

This court has gone to great lengths to protect the rights and preserve the right to jury trial of individuals charged with crime or individuals suffering imprisonment. Jesse Olds, the petitioner here, is imprisoned for life in a Hell that this court would condemn as cruel and inhuman imprisonment and he has been effectively denied the right to trial by jury. By an arbitrary label called "independent contractor" a large corporation has been permitted to injure with impunity this citizen and then the courts have denied him the constitutional right to trial by jury.

More galling than the simple denial of the trial by jury is the fact that the actual law of the case cries out that a case of this kind be submitted to a jury and this applies whether the court follows the doctrine in Erie R. Co. v. Tompkins, 58 S Ct. 817, 304 US 64, 82 L Ed 1188, to reach back to the Kentucky law or follows federal procedure.

The petitioner argues here as he has at every stage of this proceeding, that "Pip" Johnson Company was not an independent contractor, but that this company was in every way a "dependent" contractor.

The contract itself readily shows that the respondent had the right to control the very manner of doing the work, including the qualification and type of employees (p. 27a), the safety measures (p. 33a) and the power to see that the safety laws and regulations were complied with (p. 97a). The respondent's construction engineer, Carnahan, testified that it was his duty to see that the provisions of the contract were carried out (p. 71a), that he and other persons in his stead were present at all times during the contract and that he had authority to enforce the safety laws and regulations (p. 97a). In addition, there was substantive testimony that Carnahan did order changes or corrections made for what he considered

unsafe or unsatisfactory conditions (p. 117a and 118a). References in this paragraph are to appendix filed with Sixth Circuit Court of Appeals and part of this record.

Lastly, the trial court relied on Simmons v. Clark Construction Company, Ky. (1968) 426 S.W. 2d 930, but Simmons is distinguishable since in that case it was agreed that the owner did not have the right or duty to direct how the work was to be done. In stating that the retention of the right to terminate the contract without cause gives the respondent control over "Pip" Johnson and shows that the latter was not an independent contractor, the petitioner is not demanding any unusual application of the law. See Nordling v. Johnston, 283 P. 2d 420 where the court held that:

> "No fact is more conclusive of the existence of the employer's right to interfere with the manner and method of accomplishing the result than the unrestricted right of the employer to end the particular service whenever he chooses without regard to the final result of the work itself."

See also:

> "The power of an employer to terminate a contract or discharge the person employed at any time, irrespective of whether there is or is not a good cause for so doing, is indisputably an evidential element which tends strongly to show that the person employed is not an independent contractor but a servant." 41 Am. Jur. 2d, Independent Contractor § 19, P. 768.

More importantly we turn to what the Kentucky Court of Appeals says on this subject. In Coleman v. Baker, Ky. 382 S.W. 2d 843 (1964), the plaintiff's suit for damages was based on the theory that the premises and operations where the accident occurred were under the management and con-

trol of the defendant and that the accident causing plaintiff's injury resulted from the negligence of the defendant's employees. The defendant claimed that the tortfeasor was an independent contractor and introduced a contract showing this relationship between the defendant and the tortfeasor. The trial court held that an independent contractor relationship existed as a matter of law. The Court of Appeals of Kentucky reversed, holding that:

> "Under this evidence we are unable to say that the written contract introduced in evidence reflected the actual arrangement between Baker and the workmen or, if so, that it was conclusive of the question whether they were servants or independent contractors. The building was owned by Baker and the business was conducted under the name of Baker Electric Company. Until very shortly before the accident, unquestionably it was operated on a master-servant basis. That the method of payment was changed from salary to job rate (if, indeed, it was really changed) is not of dispositive significance. The ultimate test is the control reserved or exercised by the employer, and even if there is a written contract, actual practice under it may out-weigh its provisions. Cf. 53 A.L.R. 2d 183, 185. If different inferences may reasonably be drawn with respect to the true relationship of the parties, a jury question is presented. 1 Restatement of Agency 2d § 220, comment e.; 56 C.J.S. Master and Servant § 13, p. 92; 35 Am. Jur. 1040 (Master and Servant, § 600). (P. 845) (Emphasis ours)

In Brown v. Gradison Construction Company, Ky. 32 S.W. 2d 1014 (1930) the Kentucky Court of Appeals was confronted with a case involving an accident arising from the use of a truck owned by one James Richards, driven by his son Owen Richards and hired to the defendant Gradison Construction Company upon these terms:

> "Richards furnished his truck and the driver, oil, gasoline, and everything else necessary for its operation; and the Gradison Construction Company paid him $2.50 an hour for its use. Richards hired and paid this driver, and Gradison Construction Company had no right under the contract to discharge him or to put upon this truck a driver of their selection, but they had the right to send the truck home and terminate this contract when they chose. The Gradison Construction Company directed the hauling, unloading, and operation of this truck." (p. 1015)

The trial court held in substance that James Richards was an independent contractor. The Court of Appeals reversed:

> "By virtue of its power to discharge, the company could, at any moment, direct the minutest detail and method of the work. The fact, if a fact, that it did not do so is immaterial. It is the power of control, not the fact of control, that is the principal factor in distinguishing a servant from a contractor. Franklin Coal & Coke Co. v. Ind. Com., 286 Ill. 329, 129 N.E. 811." (p. 1017) (Emphasis ours).

It is the Seventh Amendment to the Constitution of the United States that guarantees the parties right to trial by jury in civil actions. The court in directing a verdict for the respondent here, not only failed to follow "Erie" in applying the substantive law of the Commonwealth of Kentucky but at the same time deprived the plaintiff of his federal and state constitutional right of trial by jury.

It might be noted that the Constitution of Kentucky as well as the Constitution of the United States jealously preserves the right of trial by jury.

> "Trial by jury inviolate. —The ancient mode of trial by jury shall be held sacred, and the right thereof remain inviolate, subject to such modifications as may be authorized by this Constitution." (The Bill of Rights, The Constitution of Kentucky (1891) § 7).

If this court is of the opinion that petitioner's right to trial by jury is procedural as stated by some of the Federal Circuit Courts then under the federal standards certainly petitioner is entitled to a trial by jury.

While the Sixth Circuit has not yet found it necessary to choose between the state and federal test, the question was discussed at length in Ewing Company v. Shipstine, 411 F. 2d 365 (1969) (Fifth Circuit). The federal standard has been set forth in the Supreme Court's decision in Lavender v. Kurn, 327 U.S. 645-654, 66 S.Ct. 740, 90 L Ed 916 (1946) where the court stated:

> "Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear." (327 U.S. at 653, 66 S.Ct. at 744, 90 L Ed at 923).

Lavender is a FELA case and therefore a statutory cause of action. It was the Supreme Court, however, that spelled out the test for the sufficiency of the evidence to create the jury question and not the statutory language. The Seventh Amendment's right of trial by jury should not depend upon the type of the action or the circuit in which the action is brought.

In Bielk v. New York Life Insurance Company, 79 S.Ct. 921, 359 US 437, 3 L Ed 2d 935 this court held that the question whether it was proper to apply the state or federal test of sufficiency of the evidence in a diversity action was not

properly before it in view of the fact that both parties in their briefs and arguments before the Supreme Court assumed that the state standard applied. Here the question is raised.

Olds reiterates that the most important evidentiary fact determining the independent contractor relationship (as determined by the state law) was in evidence and that under "Erie" the District Court was bound to let Olds go to the jury as to whether the independent contractor relationship existed between "Pig" Johnson and respondent. Secondly, Olds contends that even if he were not entitled to go to the jury under the state test for the sufficiency of evidence in this diversity action (and plainly he was) then he was entitled to go to the jury under the federal test for the sufficiency of evidence and this issue can and should be determined now.

These issues should be considered by this Court because of the general importance of determining, at last, the extent of the right afforded under the Seventh Amendment of trial by jury in common-law actions, the further importance of resolving the conflict between the Circuits (See footnote 2, page 368 Boeing Company v. Shipman, supra) on this fundamental question and further direction from this Court as to whether "Erie" is to be followed in the determination of the right to trial by jury.

It is the contention of the petitioner that an injured workman, regardless of where he works, whether on a railroad and covered by FELA, or any place, is entitled to the same right to trial by jury and, that this right is as important to an injured workman, as it is to a person accused of a crime. Imprisonment can be effected as certainly with the terrible onslaught of constant pain as it can by iron bars.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

Of Counsel

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CERTIFICATE OF SERVICE

I, Charles A. Williams, counsel for Jesse R. Olds, in the matter styled "Jesse R. Olds v. Pennsalt Chemicals Corporation," do hereby certify that I served a true copy of the foregoing petition (with Appendix) for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit on the respondent on February 1, 1971, by depositing same in a United States mailbox, with first class air mail postage prepaid, addressed to Thomas Marshall, Jr., Wheeler & Marshall, Attorneys at Law, Citizens Bank Building, Paducah, Kentucky 42001, counsel of record for the respondent.

Charles A. Williams

APPENDIX "A"

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

JESSE R. OLDS

PLAINTIFF

VS.

CIVIL ACTION

No. 1709

PENNSALT CHEMICALS CORP.

DEFENDANT

TRIAL ORDER

On May 22, 1969, this action came on for trial to a jury; there appeared Chas. A. Williams, Esquire, Sam Boyd Neely, Esquire and Cliff Walters, Esquire for the plaintiff and Thomas J. Marshall, Esquire and Ken Alexander, Esquire for the defendant. Both sides announced ready for trial and the following jury was selected, impaneled and sworn:

Eddie Lee Page	Harold Gene East
Josephine Herrington	Colnell Tucker
Elizabeth P. Kent	Johnnie Garland
Mrs. Zack Hodges	Sarah H. Padgett
James A. Kenley	Mrs. Ronald L. Lockhart
Johnny D. Sams	Ernestine Staples

On motion of the defendant, the rule was invoked as to all witnesses. The jury was admonished as to all periods of recess.

Statements were made by counsel. Evidence was introduced by the plaintiff and at 5:00 p.m. Court adjourned to reconvene at 9:30 a.m. on the following day. On May 23,

1969, Court was convened at 9:45 a.m., evidence was introduced by the plaintiff and concluded. At the close of plaintiff's proof, defendant filed written motion for directed verdict, which motion was overruled by the Court. Evidence was then introduced by defendant and concluded. At the conclusion of all the proof, defendant filed written motion for directed verdict, which motion was sustained by the Court.

The jury was instructed by the Court to return the following verdict:

"We, the Jury, find, under the direction of the Court, for the defendant Pennwalt Chemicals Corporation.

May 23, 1969 s/Johnny D. Sams (Foreman)"

The jury was then discharged by the Court at 2:40 p.m. May 23, 1969.

ROY M. SHELBOURNE
Senior District Judge
Sitting by Designation

Copies to:

Chas. A. Williams
Paducah, Ky.

Sam Boyd Neely
Mayfield, Ky.

Thomas J. Marshall
Paducah, Ky.

APPENDIX "B"

No. 19733

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

Jesse R. Olds,
Plaintiff-Appellant,
v.
Pennsalt Chemicals Corp.,
Defendant-Appellee

Appeal from the United States District Court for the Western District of Kentucky.

Decided and Filed September 30, 1970.

Before: Phillips, Chief Judge, McCree, Circuit Judge, and O'Sullivan, Senior Circuit Judge.

McCree, Circuit Judge. Jesse R. Olds appeals from a judgment entered on a directed verdict for defendant Pennsalt Chemicals Corporation in a personal injury action. Olds' employer, Pip Johnson Construction Company, had contracted with Pennsalt to construct a new building on premises owned by Pennsalt, and Olds sustained serious injuries when he fell into an unguarded catch basin and was scalded by steam which was being vented into the hole from two portable heaters which were used to raise the temperature of the floor to permit the installation of polyethylene topping. Olds received workmen's compensation benefits and was thus precluded from suing his employer by Ky. Rev. Stat. § 342.015. He instituted this action against Pennsalt as a third-party

tortfeasor under Ky. Rev. Stat. § 342.055. Federal jurisdiction is based on diversity of citizenship.

In directing the verdict, the District Judge made the following statement to the jury,[1] to explain his basis for deciding the case:

> Now, while it is not necessary that an explanation be given the jury, because it is a matter of law as determined by the Court, and as I have determined in this instance, but I want you to understand generally, and I will take just a few minutes to try to explain to you what my thinking about this case is. The plaintiff, Mr. Olds, was not an employee of the defendant, the Chemical Company, Pennsalt. He was employed by the Pip Johnson Company, and with Pip Johnson the relationship was that of master and servant—employer and employee. Now you have heard some of the argument in this case that showed that Mr. Olds, as an employee of the Pip Johnson Company, was—you may have heard it, you may not have caught it, and I am not sure it was plainly stated, but the fact is, he as an employee of Pip Johnson was entitled to the benefits of compensation under the Compensation Law of Kentucky, and therefore no suit was filed by him and none has been involved here against Pip Johnson because of that provision of compensation. And the law is, it may be observed, that the owner or occupier of property is not liable for the injury of an employee of an independent contractor or sub-contractor, in the absence of negligence on the part of the owner or occupier. There was an effort made to show that there was this negligence, but there was no evidence as I interpreted it that would warrant a submission of this case to you as to the negligence of the Chemical Company—that is Pennsalt Chemical Company . . .
>
> There is no evidence in this case that anybody representing Pennsalt knew of what this condition was on the day this occurred. As a matter of fact, it was contended that only Carnahan [the construction engineer] for Penn-

[1] We consider the District Judge's explanation of his decision as good trial practice which tends to make trial procedure more understandable to the jury and hence to make its service more effective.

> suit was the man that had this authority and he was not in there on that day. There was no evidence he knew that there was no lid on it [the catch basin], or evidence he knew that steam was arising out of it sufficient to blind a person walking in the walkway, and therefore I think there was nothing to submit to the jury that would uphold the verdict. So that is the reason, in brief, why I give you this instruction.

Appellant claims that the District Judge erred in directing the verdict, and argues on several grounds that the case should have gone to the jury. We agree with the conclusions of the District Court, and accordingly affirm its judgment.

Appellant argues first that Pennsalt breached a non-delegable duty to maintain safe working conditions. A Kentucky statute imposes the following duties:

> Every employer shall:
>
> (a) Furnish places of employment that are safe for the employees therein;
>
> (b) Furnish safeguards and safety devices reasonably necessary to protect his employees from accidental injuries; and
>
> (c) Adopt and use practices, methods and processes reasonably necessary to render such employment safe.

Ky. Rev. Stat. § 338.030(1) (emphasis added). It is clear that, under Kentucky decisions, Pennsalt was not Olds' employer. McCoy v. Griffiths, 196 Ky. 406, 244 S.W. 871 (1922). Johnson's relationship to Pennsalt was that of an independent contractor, and the rule in Kentucky is that a party is not liable for injuries to employees of its independent contractors, without a showing of negligence of the principal. Grogan v. United States, 341 F.2d 39, 42-43 (6th Cir. 1965); Simmons v. Clark Constr. Co., 426 S.W. 2d 930, 933 (Ky. 1968); City of Hazard Mun. Housing Comm'n v. Hinch, 411 S.W. 2d 686, 688 (Ky. 1967). Appellant does not challenge the District

Court's finding that there was no evidence of active negligence on the part of Pennsalt.

Nor is Pennsalt liable as owner of the premises on which the accident took place. Under Kentucky law, a landowner is not liable for injuries to an employee of an independent contractor, unless the work done or the materials used constitute a nuisance or are inherently dangerous, **Simmons v. Clark Constr. Co., supra; Jennings v. Vincent's Adm'x**, 284 Ky. 614, 145 S.W. 2d 537 (1940), and instrumentalities such as gasoline and scaffolding have been held not to be within these categories. **Jennings v. Vincent's Adm'x, supra; Gregan v. United States, supra.** By analogy, we believe that a Kentucky court would not find the use of steam under the circumstances here inherently dangerous.

Appellant also contends that Pennsalt should be held liable under Kentucky law if it agreed, in its contract with appellant's employer, to assume responsibility for safety on the job. **Cumberland Coal Co. v. Lee**, 119 S.W. 746 (Ky. 1909). Appellant argues that several clauses in the Pennsalt-Johnson contract created this duty, and points out that Pennsalt retained a construction engineer to remain on the project at all times to approve the contractor's work. The clauses in the contract upon which appellant places his principal reliance recite:

> 5r. Contractor [Johnson] warrants that he will employ on the job only those men who conform to adequate standards and work with regard to workmanship, efficiency, and responsibility in terms of life, limb or company property. These qualifications shall conform with Owner's [Pennsalt's] standards. Should any question arise with regard to these qualifications, the interpretation of Owner's Construction Engineer shall apply.
>
> * * *
>
> 15a. Upon completion of all construction work and prior

> to acceptance of the facility, Contractor will test all equipment, installations and assemblies in the presence and to the satisfaction of the Construction Engineer or his authorized representative.

The first of these clauses required Johnson to hire only competent men with good safety records, and gave Pennsalt's construction engineer power to determine what a good safety record was. Clearly it shows concern about safety, but it falls far short of imposing on Pennsalt the duty to supervise the project and the right of control. The second clause gives the right of final approval of all work to Pennsalt's representative, but his function is limited to inspection after work is completed and does not involve actual supervision of the construction work. It indicates that Pennsalt's primary concern was that the finished building conform to specifications, and that the construction engineer was not responsible for supervising the details of the day-to-day construction work. Cf. Baker v. Pidgeon Thomas Co., 422 F.2d 744, 746 (6th Cir. 1970).

Another clause of the contract expressly vests in Johnson the responsibility for maintaining safety standards on the job:

> 16a. Contractor [Johnson] must comply with safety practices required by law and/or customarily followed for this type of work.

There is no provision in the contract giving Pennsalt or its representative the right to supervise Johnson's compliance with this responsibility. Appellant argues that Pennsalt's right to cancel the contract at any time without cause gave it such power that it could have, and should be held to have a duty to, force Johnson to comply with safety standards. Perhaps this clause gave Pennsalt significant leverage, but we interpret it as a provision in the nature of a liquidated damages clause since it was followed by other stipulations providing for an

orderly termination of the contractual relation in the event that the parties could not work together. Appellant cites no Kentucky authority for the proposition that the right to cancel imposes the duty to supervise, the failure to perform which may result in liability for injuries to the other party's employees.

Finally, appellant challenges one of the District Court's evidentiary rulings. Sam Myers, Johnson's safety engineer, testified at the trial for defendant. During cross-examination, appellant introduced a written statement which Myers had made and had (some months later) signed. The District Judge admitted the contents of this statement into evidence, but instructed the jury to consider it only for impeachment purposes. This ruling, of course, precluded the judge from considering the statement's contents in deciding the motion for a directed verdict.

Under Rule 43(a), Fed. R. Civ. P., the rule most favorable to the reception of evidence, federal or state, must be followed in diversity cases. The recent case of Jett v. Commonwealth, 436 S.W. 2d 788 (Ky. 1969), requires admission of contradictory evidence for substantive purposes as well as for impeachment. The question before us, then, is whether Myers' statement, if so considered, would have required a denial of appellee's motion for a directed verdict.

Myers' pretrial statement was as follows:

> Mr. Lynch was Pennsalt's chief engineer on this particular job, and Mr. Carnahan was Pennsalt's construction engineer. I believe they both at various times did point out things they considered not safe or unsatisfactory and order changes or corrections made. Mr. Carnahan in particular was very particular about safety glasses and hard hats, and one time Mr. Lynch saw a light cord across a doorway and had me have it raised up out of the way.

Apparently appellant claims that Myers' statement indicates that Pennsalt had assumed responsibility for maintaining safe working conditions, whether or not the contract imposed such a duty. He argues that this testimony presents an issue for the jury, since Pennsalt disclaimed the assumption of this responsibility. In our view, however, the statement shows only that Pennsalt's men made suggestions as any observant person at the job site might. And even if it did indicate the assumption of a duty, no Kentucky authority is cited, nor does our research disclose any, holding that a party may be held to a duty by the conduct which Myers' statement described. Accordingly, even if the District Judge had considered this evidence in deciding the motion for a directed verdict, he would not have arrived at a different result.

Finally, it is irrelevant whether there is any difference between the federal and state standards for the directing of a verdict, because the facts presented here, under any standard, would not support a verdict for appellant under the applicable rules of law.

In directing the verdict for Pennsalt, the District Judge told the jury:

> This is an unfortunate accident. This man has had a bad experience with this injury, and I am sure you know that it is no satisfaction to me to direct your decision of this case, but feeling that the law compels me and I would be shirking from a plain duty if I did not do it, . . . [t]he Court instructs the jury that you will find and return a verdict for defendant Pennsalt Chemical Corporation . . .

We hold that the District Judge did not err, and the judgment of the District Court is affirmed.

APPENDIX "C"

No. 19733

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Jesse R. Olds,
Plaintiff-Appellant

v.

Pennsalt Chemical Corp.,
Defendant-Appellee

ORDER

BEFORE: PHILLIPS, Chief Judge, McCREE, Circuit Judge, and O'SULLIVAN, Senior Circuit Judge.

The petition for rehearing with the suggestion for rehearing en banc having come on to be heard, and the supplemental reference to the case of Rietze v. Williams, Ky. _____ S.W. 2d _____ (1970) having been filed, and no judge of this panel or other active judge of the court having requested a vote on the suggestion en banc, and the petition having been referred to the original panel for disposition, upon consideration, it is ORDERED that the petition for rehearing be and it hereby is denied.

Entered by order of the Court

Carl W. Reuss, Clerk

APPENDIX "B"

TEXT OF CONSTITUTIONAL AMENDMENTS INVOLVED

CONSTITUTION OF THE UNITED STATES

AMENDMENT VII

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

CONSTITUTION OF THE COMMONWEALTH OF KENTUCKY

BILL OF RIGHTS

§ 7.

Trial by jury inviolate. — The ancient mode of trial by jury shall be held sacred, and the right thereof remain inviolate, subject to such modifications as may be authorized by this Constitution.

LIBRARY
SUPREME COURT, U. S.

FILED
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. 1327

JESSE R. OLDS . . . . . Petitioner

versus

PENNSALT CHEMICALS CORPORATION - Respondent

RESPONDENT'S BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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MISCELLANEOUS

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. 1227

JESSE R. OLDS - - - - - *Petitioner*

v.

PENNSALT CHEMICALS CORPORATION - *Respondent*

RESPONDENT'S BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

May it please the Court:

STATEMENT

In May, 1966, the respondent herein entered into a written contract with the "Pip" Johnson Construction Company of Calvert City, Kentucky, whereby Johnson, for costs plus a fixed fee, agreed to erect and install on the property of the respondent a building and certain equipment and appurtenances necessary to enable respondent to carry on its business. The building and equipment were erected and installed according to plans and specifications submitted and made a part of the contract (Appendix 15a).[1] The Contractor was to

[1]References are to the Appendix filed with the Sixth Circuit Court of Appeals, and are a part of the record in this case, unless otherwise indicated.

furnish all labor and materials and to have complete control of the construction site. The respondent had the right and did have at the location of the work, its construction engineer.

Among those employed by the Construction Company was the petitioner, Jesse R. Olds, who was employed as a pipefitter, and about noon on February 23, 1967 petitioner sustained personal injury by accident that arose out of and in the course of his employment with the Construction Company. Precluded from suing the Construction Company by the Workmen's Compensation Act of Kentucky, *Kentucky Revised Statute Chapter 342*, he filed this action against the respondent pursuant to *KRS 342.055*, alleging the defendant-respondent to be a third party wrongdoer and liable for his damages. At the conclusion of all of the evidence the Court sustained the respondent's motion for a directed verdict and dismissed the petitioner's complaint against the respondent.

It is and was respondent's contention that the trial court acted correctly in sustaining the motion for directed verdict. There was no evidence that the Construction Company was not an independent contractor, nor that the respondent had any duty to exercise any control over the construction of the facility, including the maintenance of proper safety practices, and finally that there is substantially no difference between Federal standards and Kentucky standards governing the proper basis for taking a tort action from the jury.

ARGUMENT

1. The Act of the Trial Court in a Diversity Suit Arising Under the Common Law of the State in Directing a Verdict for the Defendant Does Not Violate the Seventh Amendment to the Constitution of the United States, Nor Paragraph 7 of the Bill of Rights to the Constitution of Kentucky.

It would seem to be established that the act of directing a verdict in a proper case being tried in the Federal Courts does not do violence to the Seventh Amendment of the Constitution of the United States, nor of course, to the Constitution of Kentucky, or its Bill of Rights.

In *5 Moore's Federal Practice, Second Edition*, page 2320, ¶50.02, Moore had this to say concerning this question:

> "Until Brady v. Southern Railroad (1943) (320 U. S. 476, 64 S. Ct. 232, 88 L. Ed. 239) was decided by the Supreme Court in 1943, the federal courts had not clearly opted between the standard that permitted a court to direct a verdict on the basis of a strong preponderance of the evidence and the 'reasonable man' type of standard indicated above. In the *Brady* case the Court announced the standard in the following terms:
>
> > 'When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict. By such direction of the

trial the result is saved from the mischance of speculation over legally unfounded claims.'

"Since that time, although they have used many different formulations, the federal courts have been reasonably consistent in the application of the *Brady* rule, that a verdict may properly be directed when, without weighing the credibility of the witnesses, there can be but one reasonable conclusion as to the verdict."

In the same text, *5 Moore's Federal Practice*, Second Edition, page 2330, ¶50.02[2], Moore discusses the constitutionality of standards for directed verdicts and had this to say:

"Repeated challenges have been made that the directed verdict procedure and standards, as heretofore described, violated the Seventh Amendment's guaranty of a right to trial by jury. The issue would seem definitely foreclosed by the decision of the Supreme Court in *Galloway* v. *United States* (1943), (319 U. S. 372, 63 S. Ct. 1077, 87 L. Ed. 1458), where a divided Court sustained the validity of the use of the directed verdict. Mr. Justice Rutledge, speaking for the Court, ruled:

'If the intention is to claim generally that the amendment deprives the federal courts of power to direct a verdict for insufficiency of evidence, the short answer is the contention has been foreclosed by repeated decisions made here consistently for nearly a century. More recently the practice has been approved explicitly in the promulgation of the Federal Rules of Civil Pro-

> cedure. Cf. Rule 50; *Berry* v. *United States*, 312 U. S. 450. The objection therefore comes too late'."

Some of the many cases cited by Moore arise under the Federal Employers Liability Act, a federal statute, and a situation where the federal courts maintain a different standard than those cases arising under the common law.

The court, in the case of *Boeing Company* v. *Shipman*, 411 F. 2d 365 at pages 374, 375, which case is cited and relied on by the petitioner, the Fifth Circuit laid down the following standards:

> "On motions for directed verdict and for judgment notwithstanding the verdict the Court should consider all of the evidence—not just that evidence which supports the non-mover's case—but in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motion is proper. . . . A mere scintilla of evidence is insufficient to present a question for the jury."

The Kentucky Court of Appeals abolished the scintilla rule in Kentucky in the case of *Nugent* v. *Nugent's Ex'r*, 281 Ky. 263, 135 S. W. 2d 877, and at page 883 gave the following as the Kentucky rule to be applied in cases of motions for directed verdict or judgment notwithstanding the verdict:

> "When the evidence given at the trial, with all inferences that the jury could justifiably draw from it, is insufficient to support a verdict for the plaintiff, so that such a verdict, if returned, must be set aside, the court is not bound to submit the case to the jury, but should direct a verdict for the defendant."

This is still the rule in Kentucky. See *Donahue* v. *Simms*, Ky., 419 S. W. 2d 154, at page 158.

2. The Owner of the Premises and the Contractee, Pennsalt Chemicals Corporation, Is Not Liable for Injuries Sustained at the Construction Site by an Employee of the Independent Contractor, Johnson, Unless the Work Being Done by the Independent Contractor Is a Nuisance or Results in a Nuisance, or the Instrumentality for Doing It Is Inherently Dangerous.

The petitioner, in his complaint (Appendix 4a) charges the respondent with certain specific acts and failure to take certain specific steps. The main thrust of petitioner's request for the issuance of the Writ of Certiorari seems to be based upon the contention that the Construction Company was not an independent contractor.

The rule in Kentucky was stated in the case of *Grogan* v. *United States* (W.D. Ky., 1963), 225 F. Supp. 821 (affirmed 6th Cir. 1965), 341 F. 2d 39. There the trial court held:

> "When an employee of an independent contractor is injured, the owner is liable only when the work done by the independent contractor is a nuisance or inherently dangerous."

The Kentucky Court of Appeals has made the same holding in *Jennings* v. *Vincent's Adm'x*, Ky., 145 S. W. 2d 537 (1940) and *Simmons* v. *Clark Construction Company*, 426 S. W. 2d 930 (1968). Far from there being an agreement in the *Simmons* case as contended by petitioner, the Court made a finding that the contractor, Clark, was an independent contractor. Therefore no cause of action would lie against the owner.

If Certiorari is granted as petitioned for herein, this Court of necessity is going to have to review the evidence produced at the trial of the case to determine whether or not the relationship of independent contractor existed between the respondent and Johnson Construction Company, and whether or not, even if that was true, the petitioner would be entitled to recover from the respondent here. There was absolutely no evidence that the work being done by Johnson Construction Company was in itself a nuisance nor that the instrumentality for doing the work was inherently dangerous, and the Kentucky court has held where work is not a nuisance and not inherently dangerous the owner is not liable. *Simmons* v. *Clark Construction Company, supra.*

In addition to the evidence of the petitioner herein, some of the fellow employees of petitioner, whose evidence does not appear in the Appendix, but is in the transcript of the evidence, testified and none testified that the respondent at any time attempted to direct the work or tell them what to do or not to do. The respondent's construction engineer, Carnahan, testified (p.

89a) that he did not as construction engineer have the right or duty to direct how the work was to be done in the performance of the contract or to employ the workers. The head of Johnson Construction Company testified that his company had charge of the construction work, the employment of the employees, and their direction (p. 98a). The evidence of these two witnesses was not repudiated or denied by any evidence introduced by the petitioner herein. The evidence simply comes down to the fact that the petitioner, as plaintiff below, did not prove by any reliable probative evidence or for that matter at all, that the relationship of independent contractor did not exist between the Construction Company and this respondent, and certainly did not prove or even attempt to prove, that this respondent was in any manner negligent so as to cause the petitioner's injuries.

It is not established that the respondent, as owner, had the right or duty to direct how the work was to be done nor did it attempt to so direct the work or the Construction Company's employees.

CONCLUSION

Respondent respectfully requests that the Petition for Writ of Certiorari be denied for the reasons heretofore given, and that the judgments of the lower courts be affirmed.

Respectfully submitted,

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Paducah, Kentucky 42001

Attorneys for Respondent

CERTIFICATION

I, Thomas J. Marshall, counsel for Pennsalt Chemicals Corporation in the above styled matter, Jesse R. Olds v. Pennsalt Chemicals Corporation, do hereby certify that I served a true copy of the respondent's Brief opposing Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit on the petitioner on March 24, 1971, by depositing same in the United States mail box with first class postage prepaid, addressed respectively to Charles A. Williams, Century Building, Paducah, Kentucky 42001, and to Messrs, Neely and Reed, 238 North Seventh Street, Mayfield, Kentucky, counsel of record for the petitioner herein.

THOMAS J. MARSHALL,
One of the Attorneys for Pennsalt Chemicals Corporation

SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
1971
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. 1327

JESSE R. OLDS . . . . . Petitioner

Versus

PENNSALT CHEMICALS CORPORATION . . . . . Respondent

PETITIONER'S REPLY BRIEF TO RESPONDENT'S BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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IN THE

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No. 1327

JESSE R. OLDS - - - - - - - - *Petitioner*

Vs.

PENNSALT CHEMICALS CORPORATION - *Respondent*

PETITIONER'S REPLY BRIEF TO RESPONDENT'S BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MAY IT PLEASE THE COURT:

STATEMENT

Respondent's brief raises issues and this reply brief is directed to them.

ARGUMENT

The petitioner, Olds, does not contend that the Federal District Court may never direct a verdict in

a diversity action without doing violence to the Seventh Amendment to the Constitution of the United States. Olds does contend, however, that the Court may not direct a verdict in a diversity case when there exists a question of fact material to the issue. Here, as argued before, there is a substantial question of fact. The respondent, Pennsalt, has stated in its brief that there was no evidence that the construction company was not an independent contractor. (Respondent's Brief, p. 2). In making such statement Pennsalt overlooks the language of the very contract involved which gave Pennsalt the right to discharge—which gives the right to control—which is the most important evidential element in determining whether the independent contractural relationship exists. See *Decker v. Glasscock Trucking Service, Inc.*, Ky., 397 S.W. 2d 773 (1966), page 775. Respondent then inconsistently sets out (Respondent's Brief, p. 7) that if the Supreme Court grants certiorari, then the Court will have to review the evidence to determine whether or not the relationship of independent contractor existed between Pennsalt and the construction company. While thereby admitting that the question exists, Pennsalt is apparently suggesting that the Supreme Court assume the duties of a jury in making this determination. That is what this case is all about. There is a factual question and all Olds has ever asked is that this factual question be submitted to the jury.

Pennsalt has cited no authorities controverting or even qualifying those Kentucky cases cited by Olds to the effect that the power to discharge gives the power to control and that the power to control, and not the fact of control, is the principal factor in distinguishing a servant from a contractor.

Also, the weight to give to the testimony of the respondent's construction engineer, Carnahan, and the head of Johnson Construction Company is for the jury. (Respondent's Brief, p. 7). See *Cross v. Clark*, 308 Ky. 18, 213 S.W. 2d 443 (1948):

> "The determination of the weight of conflicting evidence and of the credibility of witnesses rests exclusively within the province of the jury." (P. 446).

Whatever Pennsalt may maintain, it is a fact that the very contract itself gave Pennsalt the right to "discharge". *Cheatham v. Chabal*, 301 Ky. 616, 192 S.W. 2d 812 (1946) stated:

> "If the courts take over the prerogatives of juries by saying that substantive evidence, undisputed by physical facts or nature's laws and not dependent upon mere hypotheses of experts, is insufficient to carry common law causes before juries for their decisions, then a lethal and devastating offensive against free, republican government has begun in earnest." (P. 815).

Olds was, of course, a business invitee to whom Pennsalt owed the duty of discovering a dangerous condition. *Mackey v. Allen*, Ky., 396 S.W. 2d 55 (1965).

While it is not necessary to a determination of this case, it may be noted that Pennsalt states as a fact that no fellow employees of Olds testified that Pennsalt at any time attempted to direct the work or to tell them what to do or not to do. This statement is also belied by the record. The construction company's safety engineer, Olds' fellow employee, had given a

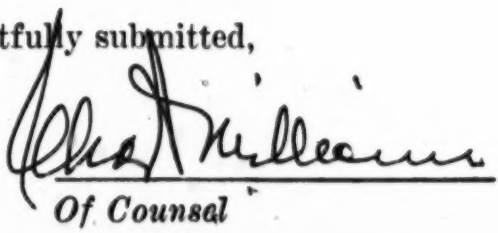
written statement setting forth directions as to safety given him by Pennsalt's construction engineer. The Trial Court excluded this as substantive testimony but the Sixth Circuit found such testimony admissible under *Jett v. Commonwealth*, Ky., 436 S.W. 2d 788 (1969). In *Louisville Cooperage Co. v. Lawrence*, 313 Ky. 75, 230 S.W. 2d 103 (1950), this was said:

> "As characteristically stated by Judge Cardoza in Glanzer v. Shepard, 233 N.Y. 236, 239, 135 N.E. 275, 276, 23 A.L.R. 1425, 1427, 'It is ancient learning that one who assumes to act, even though gratuitously, may thereby become subject to the duty of acting carefully, if he acts at all.' " (P. 105).

CONCLUSION

For the reasons set forth in the Petition and this Reply Brief, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,



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Attorneys for Petitioner

CERTIFICATE OF SERVICE

I, Charles A. Williams, counsel for Jesse R. Olds, in the matter styled "Jesse R. Olds v. Pennsalt Chemicals Corporation," do hereby certify that I served a true copy of the foregoing Petitioner's Reply Brief to Respondent's Brief Opposing Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit on the respondent on March 22, 1971, by depositing same in a United States mailbox, with first class postage prepaid, addressed to Thomas Marshall, Jr., Wheeler & Marshall, Attorneys at Law, Citizens Bank Building, Paducah, Kentucky 42001, counsel of record for the respondent.

CHARLES A. WILLIAMS